Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1243

DAVID R. HARRIS, Superintendent of Greenhaven Correctional Facility, et al.,

Petitioners,

-against-

FERNANDO BERMUDEZ, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT BERMUDEZ IN OPPOSITION

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The respondent Fernando Bermudez respectfully requests that this Court deny the Petition for a Writ of Certiorari seeking review of the Second Circuit's Order of Affirmance in this case.

STATEMENT OF THE CASE

Respondents were indicted by a Grand Jury sitting in Bronx County, State of New York, for intentional murder and other related crimes in February, 1972. Subsequent to their arrest all three respondents retained the services of

the law firm of Siegel, Graber and Bourgeois, Esqs., and this firm continued to represent the respondents through their trial and convictions for intentional murder until sentence was passed in March, 1974.

The prosecution, prior to trial and during the trial itself, did not know which of the three respondents had struck the fatal blow. The deceased's body bore only a single stab wound, the fatal one, and no other marks appeared upon it, save for some minor bruises. The prosecutor offered a "plea package" to the respondents which would have allowed two of them to plead guilty to a reduced charge and be sentenced to a year in prison. The third respondent, presumably the actual killer, would also have pleaded guilty to a reduced charge, but would have received a longer prison sentence, one requiring him to serve a minimum of four to twelve years in prison. The prosecutor left it up to the individual respondent and their lawyer to decide which sentence each one would receive if he pleaded guilty, but insisted that all of the respondents either plead guilty or all of them go to trial.

The respondents appeared before the Trial Court ten times prior to trial. Mr. Stanley Siegel, Esq., who actually represented the respondents on trial, appeared in Court only once prior to trial, on January 21, 1974. The transcript of that single court appearance is less than a page and a half in length and contains no mention of or reference to any conversation between the court and the respondents on any subject. The transcript of January 21, 1974 reveals two off-the-record conversations at the bench. One involves the Court, defense counsel, and the prosecutor. The second off-the-record bench conference involved only the Court and defense counsel. The respondents, according to the transcript, were not present at either bench conference.

The State called eight witnesses at the trial. Six of them, friends or relatives of the deceased, were eye-

witnesses to the fatal affray. They could not agree as to which respondent was fighting with the deceased at any given period, nor did any of them see the fatal, single stab wound inflicted upon the deceased. Respondent Jose Bonilla was the only one of the respondents to testify, and he admitted fighting with the deceased. Respondent Bonilla denied having a knife and stated that the two other respondents did not have knives either and did not fight with the deceased. Defense counsel, in summation, argued to the jury that none of the respondents had stabbed the accused, but that in the confusion "It would have been any member of Travieso's family" who killed him. This argument was labeled "ludicrous" by the State, and the jury agreed, convicting all three respondents of intentional murder. On March 12, 1974, the respondents were sentenced and received terms of imprisonment with a minimum sentence of fifteen years to life for the murder conviction. Respondent Bermudez appealed his conviction to the Supreme Court of the State of New York, Appellate Division, First Department. He argued that the failure of the Trial Court to inquire into the possibility of a conflict deprived him of his constitutional right to the effective assistance of counsel. The State, in response, argued that Bermudez had not been prejudiced by the joint representation. The judgment of conviction was affirmed. Leave to appeal to the New York Court of Appeals was denied by then Chief Judge Breitel on January 22, 1975.

The respondent Jose Bonilla had his appeal heard by the supreme Court of the State of New York. Appellate Division, First Department, after the respondent Fernando Bermudez had petitioned in the United States District Court for the Southern District of New York for a writ of habeas corpus. Respondent Bonilla argued to the panel hearing his appeal in the State Court that his trial counsel had raised the question of a possible conflict of interest between the respondents with the Trial Court, and

presented the Judges of the Appellate Division, First Department, with copies of the affidavit of his trial counsel, which were part of respondent Bermudez's petition for a writ of habeas corpus. Trial counsel stated in his affidavit that he had informed the Trial Court, prior to trial, that a conflict existed between his clients and requested the appointment of separate counsel for each of the respondents. Counsel further stated that the Trial Court had dismissed his request as being a "stalling tactic." Counsel for the State, appearing before the Appellate Division, First Department, conceded in that Court that the Trial Judge had not inquired into the possibility of a conflict between the respondents, but argued that the respondents had not suffered any prejudice. Respondent Bonilla's conviction was affirmed by the Appellate Division, First Department. Leave to appeal to the New York Court of Appeals was denied by then Chief Judge Breitel.

Defense counsel's affidavit was part of the petition for a writ of habeas corpus that the respondent Bermudez submitted to the United States District Court for the Southern District of New York. In response to that affidavit the State submitted an affidavit from the Trial Judge, the Honorable William Kapelman, J.S.C., in which he stated that he had asked defense counsel whether a potential conflict of interest might exist between the respondents. Upon receiving assurances from counsel that no conflict existed or was likely to arise, the Trial Court directed counsel to advise his clients of the Court's concern and to ask the respondents if they wanted separate counsel. Counsel reported back to the Court, stating he had spoken to his clients and they were satisfied with counsel. These two affidavits, the one from defense counsel and the other from Mr. Justice William Kapelman were, along with numerous other transcripts, affidavits, etc., submitted by the District Court to United States Magistrate Nina Gershon for her report and recommendation. Magistrate Gershon in her report found that the Trial Court had never addressed himself to the respondents, either in a group or jointly, about their joint representation.

After the issuance of Magistrate Gershon's report, in which she found that the respondents had been prejudiced by the joint representation at their trial, petitioner's counsel submitted a second affidavit from Mr. Justice Kapelman in which he stated, for the first time, that "he believed" he had questioned the respondents personally and they had agreed to the joint representation.

The District Court adopted the finding of the Magistrate, holding that the respondents had exhausted their State remedies and further holding that the respondents had been prejudiced by the joint representation and ordering their petitions be granted and the convictions set aside unless they were granted a new trial within ninety days.

Petitioners appealed to the United States Court of Appeals for the Second Circuit, arguing that the respondents had not exhausted their State remedies, and that the respondents had not been prejudiced by the joint representation at their trial. On November 26, 1979 the Court of Appeals summarily affirmed the granting of the writ on the opinion of the District Court.

REASONS WHY THE WRIT SHOULD BE DENIED

1. Neither the decision below nor the record raises the question presented in the petition.

The sole question presented in the petition is whether "three defendants who have jointly retained one attorney to represent them in a criminal trial can consent to such joint representation in response to an inquiry by the Trial Judge, thereby waiving their right to subsequently challenge the joint representation as ineffective under the

Sixth and Fourteenth Amendments to the United States Constitution."

The Second Circuit, however, did not decide that question in this proceeding. Moreover, neither the Court of Appeals nor the District Court was ever asked by petitioner to decide that question.

The Second Circuit in affirming the Order of the District Court granting the writs and ordering the respondents re-tried within ninety days rejected the petitioner's claim that the respondents failed to exhaust their State remedies, a claim which the petitioner had abadoned in this Court. The Court also rejected petitioner's claim that respondents had not been prejudiced by their joint representation at trial. The question raised here by the petitioner was never put to the Court below, and thus it was never decided by them.

The record below does not have the factual predicate to allow this Court to decide the single question presented. The only evidence put forth by the petitioner is an affidavit by the Trial Court that he "believes" he had questioned the respondents personally and that they had agreed to the joint representation.

The statements in the second Kapelman affidavit are controverted by the Court record, which shows no such conversation between the Court and the respondents. Thus, the second Kapelman affidavit is conclusively refuted by the Court transcript of the proceedings of January 21, 1974 and moreover, it consists of such generalities that will not entitle the petitioner to any relief because the statements concerning the Trial Judge's belief, unsupported by any other admissible evidence, would not be sufficient to give the petitioner the relief he seeks. *Dalli v. United States,* 491 F.2d 758, 760 (2nd Cir. 1974).

The record in this case is devoid of any indication that the petitioner at any time raised the question that he raises here. In the lower court and again in the Court of Appeals,

petitioner's argument was limited to which party had the burden of proof in proving the existence of prejudice from the joint representation, and only raised the question of the Judge's having inquired of the respondents concerning the joint representation to determine which party had the burden of proof to show the prejudice, or lack of it, arising from the joint representation. The question raised here was not part of the proceedings in the State Courts, the District Court or the Court of Appeals.

2. Absent a ruling by the Second Circuit as to the question raised by this petitioner, no reason exists for the grant of certiorari.

The Second Circuit did not decide, as is clear, the question now raised by petitioner. The case was decided on different grounds below than those being urged here for the first time. Thus, if this case were considered by this Court it would be decided on other grounds than those urged by petitioner, and thus no reason for granting certiorari exists.

This is a unique case and it is based on a record that precludes review of the question now being raised. Its uniqueness precludes review by this Court.

Moreover, the question which petitioner belatedly seeks to raise before this Court has already been answered in the Courts of the State of New York by the decision of the New York State Court of Appeals in *People v. Macerola,* 47 N.Y.2d 257 (1979), where the Court held that a Trial Judge must inquire of the defendants in a multi-defendant trial where they are represented by a single attorney, whether they understand the possible conflicts that could arise from such joint representation, and also inquire as to their own background, age, length of schooling, etc., to see if they understand what a conflict is and how it could arise. The New York Court of Appeals also mandated that such discussion between the Court and the defendants be on the record.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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